Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 8, 1998

Mr. Rick Perry
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711-2847

OR98-2389

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 118612.

The Texas Department of Agriculture (the "department") received a request for "a certified copy of TDA Incident No. 02-96-0043" which relates to a department investigation into possible violations of state or federal pesticide laws. You indicate that the request encompasses information involving a closed investigation. You inform us that the department has released to the requestor copies of documents for which the department raises no exception to disclosure. You assert that portions of the files are excepted from disclosure based on sections 552.101, 552.107 and 552.111 of the Government Code. You have submitted to this office the information requested.

You inform us that the requested investigative materials concern cases that were subject to contested case procedures under section 12.020 of the Agriculture Code and chapter 2001 of the Government Code, but that are now closed. You assert that the bulk of the information at issue is attorney work product, excepted from disclosure under section 552.111 of the Government Code. Section 552.111 is the proper exception under which to claim protection for attorney work product once the litigation for which the work product was prepared has concluded. Open Records Decision No. 647 at 2-3 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991). Section 552.111 of the Government Code excepts from required public disclosure:

> An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) was created for trial or in

anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See id.* When showing that the documents at issue were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensure and conducted the investigation for the purpose of preparing for such litigation. *See id.* at 5.

You state that the information at issue was collected and prepared by the department for the purpose of proving violations of state or federal pesticide laws in an administrative, civil or criminal hearing or for trial. *See generally* Agric. Code ch. 76. Based on this representation, we conclude that the department has met the first prong of the work product test.

We now consider whether the information reveals the attorney's mental processes, conclusions and legal theories. Having reviewed the information and your arguments, for the bulk of the information, we can easily conclude that the information reveals attorney mental impressions, conclusions and strategy. However, the information at issue contains summaries and other information that refers to the facts of a case. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." *See* Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning*, 818 S.W.2d at 750 n. 2). Moreover, the privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts. *See Leede Oil & Gas, Inc. v. McCorkle,* 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ). However, in *Leede*, the court noted that the attorney notes did not show how the attorney would use the facts, if at all, nor did the notes suggest trial strategy or indicate the lawyer's reaction to the facts. *See id.* at 687. We believe that an attorney's selection and organization of facts of a case may reveal the attorney's mental impression and strategy of the case. *See Marshall v. Hall*, 943 S.W.2d 180 (Tex. App.--Houston [1st Dist.] 1997, no writ); *Leede Oil & Gas, Inc.* 789 S.W.2d at 686.[1]

With regard to the facts that appear on the document contained within Exhibit B, you state:

> These facts are selected and ordered by the department's legal staff from existing sources, rather than directly acquired, as part of the legal analysis of

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[1]The privilege does not apply where the party seeking to discover information shows that the information is 1) hidden in the attorney's file and 2) essential to the preparation of one's case. *Hickman v. Taylor*, 329 U.S. 495 (1947); *see Marshall v. Hall*, 943 S.W.2d 180, 183 (Tex. App.--Houston [1st Dist.] 1997, no writ). While the open records context provides no opportunity for the requestor to make such a showing, we assume that in the usual case, the documents the department releases to the requestor contain the facts of the case.

> the investigation. These facts are selected and ordered for the purpose of aiding the attorney in his or her evaluation of the anticipated litigation and in rendering legal advice to the client agency. Because the facts have been selected and ordered by the agency attorney for the purpose of determining and communicating the legal basis and strategy for the proposed action, such recitations are non-neutral, rather than purely factual or basically factual, summaries or communications. Disclosure of such recitations would tend to reveal the attorney's mental impressions, thought processes, and legal strategy regarding the anticipated litigation. The recitations also represent the attorney's implied or express opinion regarding the importance or necessity of specific facts in proving the alleged violations(s).

We have reviewed the information and your arguments. Based on your statement that the attorney made the decision to include the facts in the summaries, we believe the facts would reveal the attorney's impressions and strategy. We therefore agree that such facts are attorney work product excepted from disclosure under section 552.111. Therefore, you may withhold the information at issue in its entirety under section 552.111.

In light of our conclusions under section 552.111, we need not address your other claims at this time. We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/nc

Ref.: ID# 118612

Enclosures: Submitted documents

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(w/o enclosures)